United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-2095

(42288)

To be argued by
PATRICIA ZESERSON

United States Court of Appeals
FOR THE SECOND CIRCUIT

ASSATA SHAKUR a/k/a JOANNE CHESIMARD,

Plaintiff-Appellant,

against

BENJAMIN MALCOLM, individually and as Commissioner of Correction of the City of New York;

JOSEPH D'ELIA, individually and as Director of Operations, Department of Correction of the City of New York; ESSIE MURPH, Superintendant, New York City Correctional Institution for Women,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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Preliminary Statement

Plaintiff, a detainee in a New York City prison awaiting trial on State criminal charges, seeks injunctive relief from, and damages for, certain allegedly unconstitutional practices incidental to her segregation from other inmates during detention. Herein she appeals from an oral interlocutory order of the United States District Court for the Southern District of New York (GRIESA, J.), made at a hearing on June 27, 1975, which (1) denied her motion to compel defendants to allow unsupervised visits to her by

three named non-professional employees of her attorney in this suit and (2) denied her motion seeking discovery of the information upon which defendants had determined that such visits might pose security risks.

Questions Presented

Plaintiff applied to the District Court for an order compelling the defendant correctional authorities to allow unsupervised contact between her and three specific individuals employed as investigators by her attorney in this civil action. Defendants had no objection to visits to plaintiff by these three people under normal conditions of supervision; they objected, however, to unsupervised access to her, such as is available to her attorney, on the ground that these three individuals are believed to pose security risks in relation to this plaintiff. The Court heard *in camera* testimony from defendants' witness respecting the basis for this belief. It denied the motion and refused to compel disclosure of the testimony. The questions presented are:

1. Is the order appealable?
2. Assuming the appeal will lie, was it an abuse of discretion either to refuse to compel defendants to permit such visits or to refuse disclosure of the testimony taken *in camera*?

Facts

Assata Chakur (also known as Joanne Chesimard, hereafter referred to as appellant), has been detained at the New York City Correctional Institution for Women, Riker's Island (hereafter Riker's Island), since May, 1974, awaiting trial on state criminal charges. On January 29, 1975, appellant began this action in the United States District Court for the Southern District of New York,

under 28 U.S.C. §§ 1343, 2201, 2202 and 42 U.S.C. § 1983, challenging as unconstitutional her segregation from the general inmate population of Riker's Island and alleging deprivation thereby of a number of constitutionally guaranteed rights (3a to 12a).* The complaint alleged that appellant had been segregated without a hearing and that she is thus deprived of rights and privileges afforded other inmates. It cites a number of practices stemming from her segregation whereby she is allegedly denied such rights and privileges (¶ 10 at 5a-7a). It is alleged that certain of those practices impair appellant's Sixth Amendment right to counsel in the preparation of her defense (¶ 19-22 at 8a-9a); it is not alleged that appellant is treated differently from other inmates with respect to access to counsel in the preparation of a civil suit.

In January, 1975, before service of answer, appellant moved in the District Court for an order compelling defendants to permit visits to her by her civil counsel and its non-legal staff, under the same conditions as defense counsel (13a). It was alleged in an accompanying affidavit of her attorney in this suit that the conditions imposed on visits by civil counsel were more restrictive than those on defense counsel. The opposing affidavit, noting that this contention was factually incorrect, informed the court that appellant's civil attorney was entitled, upon application, to a 30-day pass for unsupervised visits, renewable upon subsequent application (¶ 4 at 20).

On the same motion, appellant also sought unsupervised, unlimited visiting rights for her civil attorney's non-legal staff, including unsupervised access to any inmates, no matter where housed, who might be potential witnesses. The proposed order permitted such access for eight named persons, only one of which was clearly an attorney, and

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* Numbers in parentheses refer, unless otherwise identified, to pages in the Appendix.

would have permitted changes in the membership of that group on three days notice to the Corporation Counsel. The proposed interviewers included Jeannine Smith and Afeni Shakur (17a-18a).

Defendants opposed this request on the ground that it would circumvent the restrictions necessitated by high demand and institutional limitations which are imposed on visits to inmates by non-counsel. Furthermore, in the absence of a showing that the character and fitness of such persons have been investigated, institutional security would be unduly jeopardized (¶ 5-8, 20a-21a).

The motion also sought unlimited access to records of the Department of Correction (15a; 16a-17a). Defendants opposed this request as an attempt to bypass the discovery procedures required by the Federal Rules of Civil Procedure (¶ 10, 22a).

The motion was denied on February 18, 1975 (2a).

Defendants' answer was served on March 13, 1975.

On June 3, 1975, appellant again moved for an order permitting members of her attorney's staff to visit her at Riker's Island "under the same conditions of time, privacy and confidentiality" as attorneys, and compelling defendants to give reasons for denying such interviews, including the facts relied upon (29a).

By accompanying affidavit, appellant's attorney stated that after the denial of the previous motion on the ground, *inter alia,* that the defendants' regulations respecting attorneys' visits were reasonable, defendants' attorney, the Corporation Counsel, agreed that plaintiff's counsel was entitled to reasonable investigative services. The Corporation Counsel advised him to submit a letter requesting attorney-type visiting privileges for specific individuals, stating the name, address, present employment and past experience of each proposed investigator, as well as the date of the proposed visit and its purpose, to the Director of

Legal Affairs for the Department of Correction (31a-32a). Affiant did so on behalf of two volunteer workers, Lumumba Shakur and Wakil Shakur, disclosing, in addition to the foregoing, that each had a criminal record (Exhibit A to affidavit at 40a-41a). The nature of the convictions were not disclosed. Affiant stated that the Department of Correction denied attorney-type visiting privileges for these investigators but "indicated that a paid employee of Bronx Legal Services might be permitted access" (32a).

Affiant then sought attorney-type visiting privileges for Afeni Shakur and Jeannine Smith, both of whom had been included in the earlier unsuccessful application to the District Court, and Anthony LaBorde. The letter to the defendants' Director of Legal Affairs did not include any detailed information about the past experience or criminal records, if any, of these proposed interviewers (42a). The defendant responded by advising affiant that its policy respecting permission for interviews with inmates by investigators in a civil matter is:

> "(e) In the event the attorney designates any other person to visit the inmate with reference to a civil matter, this designated person shall apply to the court upon notice to the Department of Correction, and shall state the reason(s) for the requested visit. The court shall determine on the application whether this visit is necessary." (43a)

Affiant stated that the defendants have not revealed their reasons for refusing attorney-type visiting privileges to these individuals and contended that the refusal "has hindered and delayed the progress of the action to an unconscionable degree" (32a-33a). Ms. Shakur, Ms. Smith and Mr. LaBorde submitted affidavits to the Court respecting their present employment and past experience as legal assistants (34a-39a). Those with criminal records did not disclose them.

The defendants' opposing affidavit restated the same general objections to the circumvention of visiting regulations by non-counsel as had been stated in the earlier motion, again stressing that unsupervised visits by persons whose background has not been investigated would unreasonably jeopardize institutional security (44a-45a).

The affidavit additionally pointed out that the Department of Correction does not categorically prohibit bona fide legal assistants from making attorney-type visits to inmates, but rather reviews each request on the merits (Par. 7 at 46a). The Department refused the request for unsupervised interviews between these three individuals and this particular inmate not only because two of the three have criminal convictions but also because confidential data collected from various law enforcement agencies colorably suggest that all represent some risk to institutional security. The information was offered to the court on a confidential basis (Par. 8 at 46a). The affidavit describes Mr. LaBorde's extensive criminal record, which includes a conviction for possession of an explosive device. (A copy of Mr. LaBorde's criminal record is appended; 49a-52a). Ms. Smith was convicted of shoplifting (Par. 9 at 46a-47a). The affidavit notes that none of the three possess any particular qualifications for their appointments as investigators. It also points out that any of the three may visit appellant during normal visiting hours under the normal conditions (Par. 10, 11 at 47a).

On June 27, 1975, a hearing was held on the motion (1-27). After argument by opposing counsel, the court heard *in camera,* on the record, the information claimed as confidential by the defendants. The court then ordered the record sealed (16).

Appellant thereafter moved to enlarge her application to include all the people named on the list submitted in connection with the first application for such visiting privileges, made in January; the court indicated disapproval

and appellant's counsel withdrew the attempted enlargement so that the application before the court concerned only Afeni Shakur, Jeannine Smith and Anthony LaBorde (17). The court denied the motion, placing on the record a lengthy statement of reasons (19-25).

Opinion Below

The Court said, *inter alia* (22-23):

> "I have received evidence in chambers in a sealed record which convincingly supports the propriety of denying Afeni Shakur, Jeannine Smith and Anthony La Borde the privilege of attorney visits to plaintiff at Riker's Island. The Department of Corrections has concluded that plaintiff Assata Shakur, also known as Joanne Chesimard, is a high risk as far as escape attempt. There is a reasonable basis for this conclusion.
>
> "They have further concluded that they must take special precautions in limiting access to this plaintiff to the extent that they cannot permit Afeni Shakur, Jeannine Smith and Anthony La Borde the privilege of attorney visits to her. The information and the evidence received *in camera* on the sealed record satisfactorily justifies, in my view and beyond question, the decision of the Department of Correction to the effect that to permit the three persons in question the privilege of attorney visits would jeopardize the security and enhance the escape risk attendant upon the plaintiff in this action."

The Court noted that the fact that these three individuals had been allowed attorney-type visiting privileges with other inmates did not render a denial of such privileges unreasonable in this case (24-25). Further, there was no showing of a need for four persons (counsel

plus three assistants) to interview appellant in this civil action (20). In addition, Mr. La Borde's long and serious criminal record, Ms. Smith's lesser one, and Ms. Shakur's arrest and acquittal on criminal charges were other adverse factors (22).

The Court discussed the application of *Procunier* v. *Martinez,* 416 U.S. 396 (1974), which ruled unconstitutional a flat ban on attorney-type visiting privileges for paraprofessionals working on legal matters with prison inmates. No such ban exists here, it found, since the Department of Correction determines each request on the merits (21-22; 24). Equally important, the Court stressed, was the fact that

> "The Supreme Court in the *Procunier* case specifically noted that there might be situations where an alleged paraprofessional or legal assistant might well be denied access as an attorney because of a colorable threat to security. The latter situation is what we have here, and for that reason the present application is denied." (24; see 416 U.S. at 420).

With respect to disclosing the testimony taken by the Court, it said (23-24):

> "I further hold that the nature of the information which was conveyed to me on the sealed record in chambers is such that it should not be disclosed to plaintiff, to her attorney or to the three proposed interviewers or to the public. It relates to ongoing criminal problems and investigations and it would be most inappropriate, to say the least, to authorize its disclosure."

Appellant asked the Court for permission to appeal the interlocutory order. The Court said it had no power to act on such an application (26-27).

POINT I

This interlocutory order is not appealable since it is not a denial of any of the substantive relief sought, nor, viewed as a collateral order, has it consequences warranting departure from the requirement of finality.

(a)

Appellant asserts that denial by the District Court of unsupervised contact between her and three named persons for the purpose of preparing her civil suit is a denial of a temporary injunction in that suit and thus appealable under 28 U.S.C. 1292 (a).

That provision has been interpreted by this Court

> "as relating to injunctions which give or aid in giving some or all of the substantive relief sought by the complaint—and not as including restraints or direction in orders concerning the conduct of parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial." *International Products Corp.* v. *Koons,* 325 F 2d 403, 406 (2d Cir., 1963).

See also *Ronson Corporation* v. *Liquifin Aktiengesellschaft,* 508 F. 2d 399, 401 (2d Cir., 1974); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.,* 455 F. 2d 770, 774 (2d Cir., 1972).

It would, therefore, seem necessary for appellant to demonstrate that this order was in some respect necessitated by at least a partial determination on the merits. She has not done this; she has merely declared without discussion that on this ground the order is appealable (App. Br., p. 3, n. 1).

The order in no way expresses or implies a partial determination on the merits. In this action, substantive

relief of any kind can result only from an underlying determination that the segregation of appellant during her detention has been in some respect improper; the success of each claim and prayer in the complaint depends at bottom on such a determination. But the order sought in this application did not require any consideration of that question. It required, rather, a determination of the propriety of compulsion by the District Court to force the Department of Correction to permit unsupervised contact between an inmate in its custody and specified persons working on a civil suit pending in that court. The fact that the inmate is held in segregation while in custody may be relevant, but only if it were the sole factor opposing the order might the propriety of that segregation become material.

Here, the District Court indicated on the record that it had heard satisfactory reasons for concluding that unsupervised contact between these three persons and appellant would unduly jeopardize institutional security and enhance the risk of appellant's escape. It seems plain from the Court's statement that those reasons were separate and distinct from the fact that appellant is segregated from other inmates. There was no necessity for the Court to consider the propriety of any aspect of appellant's segregation and there is absolutely no indication that it did so.

The District Court made a finding to the effect that the Department of Correction had sufficient reason to regard appellant as a high escape risk (22-23). The existence of this finding should not be interpreted as a partial determination on the merits of appellant's segregation since there is no indication on the record, nor is it logically necessary to assume, either that the finding was based on the fact of her segregation (thus implying approval of segregation) or that it was intended by the Court to sanction any aspect of her segregation. The finding was

related only to the wisdom of compulsion by the District Court to facilitate unsupervised contact between appellant and specified persons under color of court business.

The order herein is clearly one concerning "the conduct of parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial" and therefore not appealable under 28 U.S.C. § 1292(a)(1). *International Products Corp.* v. *Koons, supra,* 325 F. 2d 403, 406 (2d Cir., 1963).

(b)

Viewing the order as an interlocutory one on an issue collateral to the main action, it does not fall within that small class of decisions which, though technically non-final, are held to be appealable. Such decisions are reviewed because, as a practical matter, they dispose finally of a claimed right too important to be denied review and too independent of the cause of action to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541, 546 (1948).

The Second Circuit has been sparing in its use of this exception to the requirement of finality, assuming jurisdiction only when all elements required by *Cohen* are clearly present. See *General Motors Corp.* v. *City of New York,* 501 F. 2d 639, 644 (2d Cir., 1974); *Kohn* v. *Royall, Koegel & Wells,* 496 F. 2d 1094, 1097-1099 (2d Cir., 1974); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.,* 496 F. 2d 800, 802 (2d Cir., 1974); *Clark* v. *Kraftco,* 447 F. 2d 933 (2d Cir., 1971).

Kohn, supra, which dealt with the appealability of an order granting class standing, restated the *Cohen* rule as requiring the presence of three elements. Paraphrased to eliminate references to class standing, they are:

(1) the order sought to be appealed affects an issue fundamental to the further conduct of the case;

(2) review of the order is separable from a consideration of the merits;

(3) non-review of the order will cause irreparable harm to the party seeking review. (See 496 F. 2d at 1098.)

This formulation was reaffirmed by this Circuit after the discussion of appealability of non-final orders by the Supreme Court in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). *General Motors Corp.* v. *City of New York, supra,* 501 F. 2d at 644-648. To the argument that Eisen III had broadened the parameters governing the appealability of orders granting class action status, this Circuit replied,

> "To the contrary, we find in *Eisen* a reaffirmation of the exceptional circumstances required to justify departure from the 'final judgment' rule . . ." 501 F. 2d at 646.

We do not believe that the order for which review is here sought presents such circumstances. First, the interviewing services of these three particular individuals can hardly be considered fundamental to the further conduct of the case. While disqualification of counsel is so regarded because the client is thereafter precluded from reliance on his work product (see *Ceramco, Inc.* v. *Lee Pharmaceuticals,* 510 F. 2d 268 (2d Cir., 1975)), the services of specific paraprofessionals have not yet been deemed so unique. Nor is the question of the effect of their semi-disqualification so novel and serious as to call for clarification by the circuit, as was the question of a District Court's power to order pre-trial consolidation and lead counsel, as in *MacAlister* v. *Guterma,* 263 F. 2d 65, 67 (2d Cir., 1958), and *Farber* v. *Riker Maxon Corp.,* 442 F. 2d 457 (2d Cir., 1971), thus rendering those interlocutory orders appealable.

Second, while review of the order could clearly be carried out without reviewing the merits of the main action, any

effect allegedly prejudicial to success in that action can be evaluated, like a discovery decision or an evidentiary ruling, on review of an adverse final judgment. This is not an order where refusal to review at this time would "infect the entire proceeding with error and thus require reversal after large expenditure of judicial and professional time," as in *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F. 2d 1197, 1201 (2d Cir., 1970). But, even there, although that consideration resulted in review of an order not meeting all the *Cohen* requirements, it was carried out as part of the review of another order in the same case over which the Court had undisputed jurisdiction.

Third, no irreparable harm can result from deferred appeal since the order does not deny to appellant private interviewing services of any persons but the named three. Her attorney remains free to designate for that function other persons acceptable to the Department of Correction or to the District Court. And these three persons remain free to interview appellant under normal, supervised, visiting conditions.

Thus, even were *Eisen III* read as authorizing an open-ended, largely unstructured balancing test for determining appealability of non-final orders, compare REDISH, *"The Pragmatic Approach to Appealability in the Federal Courts"*, 75 Col. L. Rev. 89 (1975), we would still submit that this order should be held not appealable. The "danger of denying justice by delay" (417 U.S. at p. 171, quoting from *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 [1950]), which would result here from denial of immediate appellate review would appear most slight. In order to effectively prosecute this civil action appellant can employ other, presumably equally competent, investigators.

Appellant claims, however, that this order effectively forecloses for her all private interviewing by any designees of her attorney. The record contradicts this contention

since it contains no indication that the Department of Corrections intends or desires to prevent private interviewing of appellant by appropriate persons, nor that it intends or desires to reject all persons designated by appellant's attorneys.

Moreover, even were this true, which we do not concede, such a restriction on paralegal participation in appellant's civil action would not infringe any right protected by *Procunier* v. *Martinez,* 416 U.S. 396 (1974), and thus even that erroneous view of the facts would not warrant an exception to the requirement of finality.

That case does not, as appellant seems to urge, grant to one in custody an unqualified right to access on the prisoner's terms to paralegals of the prisoner's choosing without regard for institutional security. As the District Court pointed out when making this order, *Procunier* ruled only that an absolute ban on interviews between an imprisoned client and paralegals employed by his attorney unjustifiably burdens the prisoner's right of access to the courts; the Supreme Court carefully excluded from its holding those restrictions whose purpose it is to screen out "interviewers who pose a colorable threat to security" or to isolate "inmates thought to be especially dangerous." 416 U.S. at 420. Moreover, the Court explicitly recognized that paralegal visitors are not exempt from monitoring, as shown by its statement that the prison authorities involved in that case had failed to show that "a less restrictive regulation would unduly burden the administrative task of screening and monitoring visitors." *Id.*

These limitations are warranted, the Court stated, because

> ". . . prison administrators are not required to adopt every proposal that may be thought to facilitate prisoner access to the courts. The extent to which that right is burdened by a particular regulation or prac-

> tice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials." 416 U.S. at 420.

Thus, *Procunier* defined only a right to paralegal services by those reasonably deemed by prison authorities to be acceptable security risks. That right is unimpaired by this order. Without a showing that an interlocutory order has irreparably harmed a fundamental right, or a claim of right presenting "serious and unsettled" questions, there is no appellate jurisdiction under *Cohen*. 337 U.S. at 547.

(c)

Nor does the refusal by the District Court to disclose the confidential information on which it based its order bring that order within the *Cohen* exception, since that refusal does not infringe any right of appellant's. The power of a court to decide whether the public interest would be harmed by disclosure of material claimed by a governmental agency to be confidential is well recognized. See *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953). The court must balance against the claim of privilege the showing of necessity made by the party seeking disclosure; when that showing is weak, the privilege prevails. *United States* v. *Reynolds, supra*, 345 U.S. at 11.

Appellant here makes absolutely no showing of necessity. Her arguments for disclosure are effectively two, both resting on due process: a right to material in the hands of an adversary; a right of her attorney and his employees to practice their profession free of restrictions imposed without adversary confrontation. The first claimed right is not menaced by this order in any way; the rationale for such a right is the need for equal access by adversary parties to evidence relevant to the outcome of the prosecution or litigation, as in the cases cited by appellant, e.g., *United States* v. *Coplon*, 185 F. 2d 629 (2d

Cir., 1950). The order here resulted from an application made to the District Court on a matter ancillary to the main litigation; material relating to possible risks to prison security posed by certain investigators in that action is not even arguably relevant to the merits of the litigation. This order adjudicated no substantive claim of right and no questions of guilt or innocence; hence the refusal to disclose can in no way alter the outcome of appellant's litigation.

Nor does the refusal to disclose the material abridge the right of appellant's attorney and his employees to practice their professions. Appellant's standing to vindicate this right is not clear, but the fact that the right is untouched by this order is blindingly clear. These paralegals may, so far as this order is concerned, perform all tasks assigned them by their employer but for private interviewing of this particular client. The attorney is not hindered in his representation of this or any other client; it is clearly advisable and might possibly be beneficial for him to investigate fully the background of employees and to use them appropriately.

(d)

Appellant has presented no other "serious and unsettled" claims of right necessitating exceptional review at this time. She urges that the privilege was improperly invoked for lack of affidavit by the Commissioner of Correction with a precise statement of his reasons for claiming privilege. This Court is referred to the affidavit of the Corporation Counsel presented in opposition to the motion, describing the material in general, averring that the correctional officials have examined it, and offering it to the court on a confidential basis (Para. 8 at 46a). This statement is in substantial compliance with the requirements for claiming privilege stated in *United States* v. *Reynolds, supra,* 345 U.S. 1 at 8, and surely does not pre-

sent a question of the gravity required for exceptional assumption of appellate jurisdiction under *Cohen*.

Another factor militating against review is that the decision of the District Court was discretionary; a discretionary interlocutory order that does not foreclose a clear right, or a claim of right presenting serious and unsettled questions, is not reviewable under the *Cohen* exception. 337 U.S. at 547. Accord, *Stack* v. *Boyle*, 342 U.S. 1 (1951), which allowed an appeal under *Cohen* from a denial of a motion to reduce excessive bail because the denial on the facts there presented did not lie within the lower court's discretion. As this Circuit stated in *General Motors Corp.* v. *City of New York, supra*, 501 F. 2d at 647,

> "That this distinction [between a 'finite and conclusive determination of judicial power' and a discretionary one] is of fundamental importance in the calculus of appealability was plainly acknowledged in *Cohen* itself."

POINT II

Assuming the order to be reviewable, the discretion of the District Court was soundly exercised and should not be disturbed.

As we have already argued, appellant made no showing of necessity for the services of these particular investigators nor for disclosure of the information upon which the Department of Correction refused attorney-type visiting privileges to them. The District Court's refusal to compel the Department of Correction to extend those privileges evinced that "proper regard" for the "expertise and discretionary authority of correctional officials" required by the Supreme Court in *Procunier*. 416 U.S. at 420. The Court found that the material upon which the correctional officials screened out these persons from private visits with appellant presented good and sufficient reasons. If this Court

assumes jurisdiction, it will have the power to examine that material and determine whether the District Court abused its discretion in refusing to compel defendants to allow these persons to have unsupervised access to a detainee whose presence at trial is defendant's responsibility. It will also be in a position to determine whether it was an abuse of discretion to determine that appellant's interest in knowing why these investigators were barred from private visits with her does not outweigh the public interest in preserving the confidentiality of data gathered by law enforcement officials in the course of ongoing investigations of criminal problems.

CONCLUSION

The appeal should be dismissed or, in the alternative, the order of the District Court should be affirmed.

August 25, 1975.

Respectfully submitted,

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